MIDLAND LIVESTOCK COMPANY ET AL.

IBLA 72-404, 72-405 Decided May 14, 1973

Appeal from two decisions of Administrative Law Judge Dent D. Dalby, Wyoming 4-70-23, etc., and Wyoming 4-71-6, affirming various decisions of the District Manager for the Rock Springs Grazing District relating to the carrying capacity and apportionment of the federal range.

Affirmed.

Grazing Permits and Licenses: Adjudication

An Administrative Law Judge's decision adjudicating grazing privileges within a grazing district will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal Range Code for Grazing Districts.

Grazing Permits and Licenses: Apportionment of Federal Range

Where a grazing allotment includes both private and federal range lands, the Bureau of Land Management may properly determine the grazing capacity of all the lands in the allotment and require, as a condition to the issuance of a permit or license to graze the federal range, that the number of livestock using the private lands be limited to the recognized capacity of the lands.

Grazing Permits and Licenses: Apportionment of Federal Range

The fact that an allocation of federal range leaves a section of privately controlled land isolated from the remainder of an operator's land does not of itself require a revision of the allocation.

Grazing Permits and Licenses: Apportionment of Federal Range

A permittee or licensee has no right to any particular area of the federal range under the Taylor Grazing Act or the Federal

Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the selection of the particular area in which the range user may exercise his grazing privileges is a matter committed to the discretion of the Department.

Grazing Permits and Licenses: Apportionment of Federal Range -- Grazing Permits and Licenses: Appeals

The economic effect of the transfer, reduction or other change in grazing privileges of a particular range user is but one factor to be considered by the Board of Land Appeals in determining if a decision appealed from is unreasonable or should otherwise be reversed or modified.

Grazing Permits and Licenses: Apportionment of Federal Range -- Grazing Permits and Licenses: Appeals

An objection to a change in trailing use previously granted will be rejected where it is not shown by clear, probative evidence that the new trailing use is the result of an arbitrary or capricious decision by the responsible officials.

Grazing Permits and Licenses: Appeals

Any applicant for a grazing license or permit who, after proper notification, fails to protest or appeal a decision of the District Manager within the period prescribed in the decision, is barred thereafter from challenging the matters adjudicated in such final decision.

Grazing Permits and Licenses: Range Surveys

A range survey by the Bureau of Land Management determining the carrying capacity of a federal range area will not be disturbed solely on the basis of charges that it was not properly conducted where no substantial evidence is submitted demonstrating error in the survey.

APPEARANCES: Joseph H. Galicich, Esq., of Galicich and Hamm, Rock Springs, Wyoming, for appellants Midland Livestock Company and Dunton Sheep Company; Mark C. McLachlan, Esq., and Milton A. Oman, Esq., of Salt Lake City, Utah, for appellants G. & E. Livestock, Inc., and Erramouspe Brothers; Thomas C. Bogus, Esq., Field Solicitor, Cheyenne, Wyoming, for appellee Bureau of Land Management.

OPINION BY MR. HENRIQUES

Midland Livestock Company and Dunton Sheep Company (hereinafter referred to as Midland-Dunton), G. & E. Livestock, Inc., and Erramouspe Brothers have appealed from the decision of Administrative Law Judge Dent D. Dalby, 1/ dated March 30, 1972, to the extent that the Judge's decision affirmed the decisions of the District Manager of the Rock Springs Grazing District of Wyoming, Bureau of Land Management, dated March 16, 1971. 2/ A number of issues are pressed on appeal, some of which are common to all appellants and others which are relevant only to individual appellants.

The first major issue raised concerns the propriety and correctness of the District Manager's determination of the carrying capacity of appellant's privately owned and controlled lands located within the Northeast Unit of the Rock Springs Grazing District. The unit contains more than 2,000 square miles of range in southwestern Wyoming. Within the unit are numerous parcels of privately owned and leased land. Prior to 1969 use of the range was awarded on a percentage-use basis. The method of computation of the applicable percentages was a matter of some dispute but the Judge found that "[n]ormally, licenses issued on this basis reflect the ratio between the amount of forage produced on Federal land and that produced on a licensee's unfenced privately controlled land grazed in conjunction with the Federal Range." It should be noted that this interspersed land was "base" land (commonly called parallel base) from which class 1 demand rights emanated. 3/

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1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).
2/ Originally, four parties appealed from the decision of the District Manager. White Acorn Sheep Company, however, has not appealed from the decision of the Judge. Additionally, the following parties were Intervenors at the hearing below: Little Sandy Grazing Association; Dr. Noall Z. Tanner; Blair and Hay Land & Livestock Company; Magagna Brothers, Inc.; and Bar X Sheep Company.
3/ 43 CFR 4110.0-5(m)(1) provides:

"'Land dependent by use' means forage land other than Federal range of such character that the conduct of an economic livestock operation required the use of the Federal range in connection with it and which, in the 'priority period', was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain,

This percentage licensing procedure became less favored with the passage of time and the acquisition of range management experience. Thus, in 1965 the BLM Manual declared that:

> The practice of issuing a regular or desert license or permit in terms of 100% Federal range use and a separate exchange-of-use grazing agreement for the grazing capacity of non-Federal grazing lands controlled by each applicant and used in common is generally preferable to issuing percentage on and off licenses. One hundred percent Federal range use plus separate exchange-of-use grazing agreements more clearly depicts allowances for particular tracts of land in each status, aids in keeping records current and facilitates review. The practice of issuing percentage on and off licenses will be discontinued except in those cases where they are clearly advantageous. Such exceptions will be largely restricted to individual allotments. In those districts that have customarily used percentage on and off licenses, the transition to a 100% Federal range license should be an objective to work toward in common use areas. The issuance of an exchange-of-use grazing agreement involving dependent base property will not result in the disqualification of the base lands with regard to dependency by use under the Grazing Regulations (43 CFR 4110.0-5(k)(i)). BLM Manual 4115.21A6c

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fn. 3 (Cont.)
now part of the Federal range. Such land may be (i) parallel land, i. e., land of the same character, interspersed with, and grazed at the same time as the Federal range on which grazing privileges may be granted, except in those grazing districts which by special rule have excluded parallel land as base property, (ii) land of different character than the Federal range and which properly supports the permitted livestock during all or part of the period that the Federal range is closed to grazing, or (iii) a combination of these two types of land. * * *" (Emphasis added)

The underlined portion was added to the definition of land dependent by use in 1959 to clarify decisions such as Fine Sheep Company, 58 I.D. 686 (1944), relating to the availability of such interspersed lands for use as base lands. See discussion in Herschel Bedke, A-28607 (July 21, 1961).

[*393] A survey of all lands within the unit was conducted in 1964 4/ employing the ocular reconnaissance method. This method involves the inventorying of vegetation estimating both the total forage density and the percentage composition. The succeeding procedures were synopsized by the Judge as follows:

> * * * The first step in the survey consists of preparing detailed type maps in which the various forage types are classified and outlined. The surveyors traverse an area making sufficient sample observations in each of the forage types to support a projection of the observations to the entire type area. The percentage of the area totally covered by vertical ground cover is estimated. The individual species of vegetation are identified and the percentage of each to total composition is also estimated. The observations or samples are recorded on a standard form. The percentage of each species of plants (proper use factor) which may be properly utilized by livestock without detriment to the range is established. Proper use is the degree of utilization of current growth of a particular plant by a class of animal without detriment to the plant. The proper use factors are based on the study of the total composition of the range being surveyed. In computing the carrying capacity, the percentage composition of each species is multiplied by the proper use factor for that species in order to arrive at a figure which is designated as the forage value factor.
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> The forage value factors for all of the species covered by the range observation or analysis are totalled. The total, multiplied by the average density of all of the forage in the area observed, produces a forage acre factor. * * * A forage acre is a theoretical acre of land totally covered with vegetation which can be entirely consumed by livestock without damage to the range. The forage acre requirement is divided by the forage acre factor to arrive at the number of surface acres required to produce an animal-unit month [AUM] of usable forage for the forage type covered by the survey. The forage acre requirement is that portion of a forage acre required to sustain one animal unit for one month.

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4/ Certain fenced lands that consisted of hay, meadow and irrigated pasture and could not be the subject of an exchange-of-use agreement were excluded from the survey. (Tr. 415-416).

> In order to complete the survey, the forage acres are converted into acres per animal-unit months. This is accomplished by determining the amount of a forage acre that is required to sustain an animal unit (one cow or five sheep) for one month. This forage requirement is determined by study of a controlled pasture which is of a type similar to the range being surveyed and where the stocking rate is known. The forage acres in the controlled pasture, determined on the same basis as that used for the range survey, are divided by the average animal use deemed to be proper to compute the forage acre requirement. The forage acre requirement is not a constant figure. It may vary in different surveys. These differences result from variations in the nutritive value of the forage, the proper use factors applied, and the estimating concepts and procedures used by the surveyors.
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> The forage acre requirement is the critical figure in determining carrying capacity of the range. It is inversely proportional to the total computed carrying capacity. The higher the forage acre requirement, the lower will be the end computation of carrying capacity.

Because there were two elevational ranges within the unit, two control pastures were employed in the determination of the proper forage acre requirement. For the lower elevations, a pasture known as the G. L. Block, which was utilized for winter sheep grazing, was used as the control pasture. Since supplemental feed of corn and hay had been provided, however, the forage value of the feed was subtracted from the total actual use in arriving at the forage acre requirement. The District Manager had computed a forage acre requirement of .35 for sheep. The Judge found that the proper ratio of the supplemental hay was not 4 AUM's per ton as the District Manager had argued but rather approximately 3 AUM's per ton. Applying this ratio the Judge ruled that proper computation of the forage acre requirement, as evidenced by the actual use of the G. L. Block pasture, was .34. The Government has not appealed from this determination.

In computing the forage acre requirement for cattle at lower elevations, the Bureau's range surveyors applied the proper use factors for cattle to the actual use figures from the G. L. Block. This resulted in a forage acre requirement of .27.

To determine the forage acre requirement for the higher elevations, a control pasture known as the Peternal pasture was

used. This pasture had been grazed by cattle, without any supplemental feeding, and the ascertained forage acre requirement for cattle was .24. Applying the proper use figures for sheep to the actual use figures from the Peternal pasture, a .28 forage acre requirement for sheep was determined.

The forage acre requirements as determined from the control pastures were then divided by the net forage acre factor as computed on the basis of the ocular reconnaissance survey of the Northeast Unit to determine the surface acres needed to produce one AUM. Applying these figures to the privately owned and controlled land in the Northeast Unit resulted in a total diminution of carrying capacity from 27,174 AUM's to 11,466 AUM's. In the case of appellant Midland-Dunton there was a decrease from 3,520 AUM's to 1,223 AUM's. Appellant Erramouspe Brothers suffered a decline of from 1,891 AUM's to 489 AUM's, while appellant G. & E. Livestock declined from 754 AUM's to 410 AUM's.

The importance of this decline lies not in any effect it has on appellants' class 1 demands, since there was no lowering of their demands. 5/ Rather, since the unit is seeking to follow

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5/ This is a somewhat difficult point to deal with. The important thing to keep in mind is the fact that not only are these lands potential exchange-of-use lands, but they are also base lands. An individual's class 1 demand is determined by the lower of the figures derived from (a) dependency by use and (b) commensurability. Commensurability has been defined as "the number of livestock which could be maintained properly from the forage and feed produced on the dependent base property for the months of each year during the priority period when the livestock did not use the range * * *" Ethel Cowgill Rayburn, A-28866 (September 6, 1962). As a declaration of the initial procedure for determining commensurability, the statement cited above is correct. Present commensurability, however, is a matter equally necessary to maintain an individual's class 1 demand, see Arthur V. Heller, 66 I.D. 65, 66-68 (1959); Porter Estate Company, A-30817 (December 2, 1968). Thus, a lowering in the carrying capacity of base lands should, a fortiori, result in the lowering of the commensurability rating and lead to a decrease in class 1 demand.

These interspersed lands, though, are not appellants only base properties. All parties have lands on which base property qualifications are met both within and outside of the unit. (Tr. 29-34). Thus, it is possible that commensurability still exceeds the amount necessary to maintain their class 1 demands. There was no dependent property survey conducted on this point, since the Government felt that "there was no one apparently short of any commensurability. Each operator appeared to have sufficient." (Tr. 395).

the BLM Manual's admonition to change to 100 percent licensing and exchange-of-use agreements, the District Manager has taken the position that the appellants (and, indeed, all individuals or groups that own or control land within the unit) will not be given any additional grazing privileges beyond their established class 1 demand, unless they execute an exchange-of-use agreement pursuant to 43 CFR 4115.2-1(h) (1972) which provides as follows:

> Exchange-of-use agreements may be issued to any applicant having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range for not to exceed the grazing capacity of such non-Federal land, without payment of grazing fees, provided that during the term of the agreement the Bureau shall have the management and control of such non-Federal land for grazing purposes.

Thus, by lowering the carrying capacity of the privately owned and controlled land, the amount of AUM's which can be granted under an exchange-of-use agreement has been proportionately lessened, resulting in an overall decline in the amount of AUM's that can be granted to the appellants.

Initially, the appellants object to the propriety of the Bureau's rating of the carrying capacity of their interspersed lands. In David Abel, 2 IBLA 87, 78 I.D. 86 (1971), this Board held that since, as a practical matter, the rating of privately controlled interspersed lands is inextricably intertwined with the proper management of the federally administered lands in a grazing unit, there could be no valid objection to the establishment of the carrying capacities of such private lands. If the appellants choose not to offer their lands in an exchange-of-use agreement they are free to fence them and graze any amount of livestock they believe wise. Midland-Dunton's objection that this forces them to accept government management of their lands is ingenuous. If they wish credit on federal land for the grazing capacity of their private lands they are obliged to execute an exchange-of-use agreement. If they do not want to surrender administrative control of their lands they cannot be heard to complain that they have not been accorded federal range on the basis of their private lands since the fundamental requirement of an exchange-of-use agreement is a quid pro quo arrangement. See also Lloyd Pewonka, James Caves and H. R. Sudbrack, 8 IBLA 303 (1972).

Secondly, appellants strenuously attack the methods employed in the range survey on a number of grounds, including the inexperience of the range surveyors, the passage of time from the

making of the survey to its implementation, the situs of the control pastures and the manner in which actual use of these pastures was determined, and the ultimate determinations of the grazing capacity of their private lands. As regards the first ground of contention the survey was conducted by junior, senior and graduate college students, majoring in range management, under the supervision of Frank Noll, who at that time was a Range and Wildlife specialist for the Rock Springs District. They were given a week of special instruction by Noll prior to commencing the survey. The field work consumed approximately 10 man-months of time. Appellant Midland-Dunton contends that these students lacked sufficient expertise to accurately rate the carrying capacity of the lands in the unit. They note that the Judge in his decision found that insufficient value had been given to the wet and dry meadows found on appellant's land adjacent to the Big Sandy River and that these private lands should have a carrying capacity of 387.6 AUM's rather than the 200.3 AUM's assigned to it by the survey. Further, they point to Noll's testimony that on some of his spot checks he had been unsatisfied and had ordered the work redone. From this appellants conclude that it is clear that the college students failed to make an accurate survey.

At the outset, we note that the mere fact that the actual surveyors [**16] are college students working under the supervision of BLM officials does not give substance to a claim that a survey is inaccurate. See Alvie Holyoak Estate, 9 IBLA 37 (1973); E. L. Cord, 9 IBLA 178 (1973). The Judge below found error in the computation of the carrying capacity of the wet and dry meadows within appellant Midland-Dunton's private lands along the Big Sandy River, and we agree. But appellants have introduced no evidence of other specific error though they maintain that actual use indicates a far greater capacity than that shown by the survey. The actual use argument will be considered, infra; we merely note here that the finding of error, amounting to a total miscalculation of 187.3 AUM's can scarcely be said to prove the invalidity of the entire survey. Further, we find it somewhat anomalous to contend that by running spot checks and discovering a few errors and directing their correction, the survey results are more vulnerable to attack than if no supervisory control had been exercised by Noll.

Appellants contend that the passage of nearly seven years from the date of the range survey to its initial application in 1971, effectively vitiates any utility that might flow from its implementation. In Alvie Holyoak Estate, supra, Administrative Law Judge Robert W. Mesch noted that such a contention "might

have considerable merit." In that case, however, he avoided the question since he ruled that the proper dates to focus on were the period between the survey and the District Manager's actions (in that case approximately two years) and not the period from the District Manager's decision to the date of the hearing (a period of nearly seven years). In the case at bar, however, the issue is more squarely joined, since the seven-year period occurred between the date of the survey and the District Manager's decision. The problem, however, is that the range survey in 1964 was the first attempt to systemically evaluate the private holdings in the Northeast Unit. Noll testified that prior to 1964 the carrying capacity had been established as an original determination on the basis of discussions between the Grazing Service and those utilizing the federal range, and that the sharp decline evidenced in the survey was the result more of an initial error than a long-term depletion of the forage present on the lands. Joe Thackaberry, an expert witness testifying on behalf of the appellants declared: "* * * in my opinion I'm certain that there was an error made when the licenses were originally set up in determining the balance of percent federal range as percent use of privately controlled range lands." (Tr. 102) Thus, the choice would be between a range survey seven years old which might not be accurate and past practice which both Noll and Thackaberry declared was inaccurate. We note that the BLM Manual requires certain primary studies on all areas "where an allotment management plan or grazing system has been implemented." BLM Manual 4412.21G1. Thus, substantial changes (if they have occurred) will be picked up in succeeding years and the allotments varied accordingly. It would serve no purpose to nullify this survey where there has been no evidence presented by the appellant as to proper carrying capacity other than the suggestion that past actual use can be taken as an authoritative guide as to the proper carrying capacity. This argument, as we have already indicated, will be fully examined infra.

The appellants contend that the control pastures used in ascertaining the proper forage acre requirement were improper since they both were beyond the exterior boundaries of the grazing unit. The G. L. Block pasture was located outside of the Northeast Unit, while the Peternal pasture was more than 60 miles distant from the nearest boundary of the unit. The mere fact that the control pastures were outside of the unit, without more, is irrelevant. See Alvie Holyoak Estate. supra, at 43. The proper question is whether the control pastures are similar to the lands found in the unit. No evidence was adduced by the appellants which would indicate any substantial differences from the point of view of climatology, geology, elevation or other relevant factors.

Appellants do point to the fact that the grazing use of the G. L. Block pasture was for winter sheep, and they note that there is no winter grazing within the Northeast Unit. When Noll was questioned by appellants' attorney he admitted that determining the proper forage acre requirement from the use of a control pasture grazed at a different time of year than the unit would be utilized would make a difference in the determination of the forage acre requirement. He explained, however, that they did not have any suitable control pastures for summer sheep and that the lower elevations for which the G. L. Block pasture was considered representative were used primarily in the late fall and this was comparable to the winter use of the G. L. Block pasture. He justified the use of the control pasture as the best available information. (Tr. 581-585).

We must admit that we find it somewhat difficult to understand why the BLM could not establish control pastures within the Northeast Unit. Certainly, the exigencies of time could not be a valid argument, compare, Melvin Adams, A-30406 (November 1, 1965), since the results of the survey were not applied for over seven years. Appellants, however, have not shown by any positive, probative evidence what a proper forage acre requirement would be. Generalized appeals to the talisman of "actual use" will not suffice. Indeed, appellant Midland-Dunton's witness Thackaberry testified that the forage acre requirement for cattle on the Peternal pasture was properly determined. (Tr. 74). Thackaberry took exception to the development of a forage acre requirement for sheep from the actual use data for cattle obtained from the Peternal pasture and similarly objected to the derivation of a forage acre requirement for cattle from the actual use data for sheep obtained from the G. L. Block pasture. The basic premise of Thackaberry's position was that it was improper to apply the proper use figures of sheep and cattle respectively to pastures they did not utilize. Instead, Thackaberry would apply the forage acre requirements for cattle derived from the Peternal pasture without any change to sheep use for the higher elevations, i.e., .24, and the forage acre requirements for sheep use derived from the G. L. Block pasture without any change to cattle use for the lower elevations, i.e., .34.

The difficulty of such a procedure is apparent on its face. It ignores totally a consideration which all parties admit: namely, that cattle and sheep have different eating habits and thus varied proper use factors.

The Judge noted that in William D. Cornia, Utah 1-63-1 etc., (August 25, 1965) the Department validated both the approach

advocated by Thackaberry and that followed herein by the District Manager. To the extent that the Cornia opinion endorses the procedures employed in the case at bar, we agree.

Finally, appellants argue that the control pastures were not really "controlled" at all, that all of the evidence the Government presented as regards the pastures was hearsay, and that under the "residuum rule" there was no legal evidence on which to uphold the District Manager's actions. As regards the allegation that the control pastures were not "controlled" appellants stress the fact that there were no BLM officials making actual use counts and that the BLM merely relied upon statements supplied to them by the pastures' users. Such statements, they contend at length, are hearsay and provide an insufficient basis upon which to justify the survey results.

It is here that appellants make their essential error. The BLM is not required to affirmatively justify its action in a grazing hearing in order to sustain a survey. Rather the burden rests with those challenging a range survey to prove by positive evidence that the survey is erroneous. See United States v. John K. Johnson, 8 IBLA 68 (1972); E. L. Cord, dba El Jiggs Ranch, 64 I.D. 232 (1957); David Abel, supra. To merely show, as was done in this case, that the control pastures were susceptible to incorrect determinations is insufficient. What must be shown is that the control pastures utilized yielded erroneous results. This appellants have not done. As we have pointed out supra, appellants' witness Thackaberry testified that the forage acre requirement derived from the Peternal pasture, relating to cattle, was in his opinion correct. At a later point in his testimony, he declared that a proper forage acre requirement for both sheep and cattle in the lower elevations would be .34, 6/ this based on the forage acre requirement for sheep as determined from the G. L. Block pasture. (Tr. 82-83). As their own expert either explicitly or implicitly accepted the use of both the Peternal and the G. L. Block control pastures as correct, we find it impossible to find on the basis of the record that the appellants have carried their burden of proof so as to invalidate the forage acre requirement derived from the control pastures.

Finally, as regards the carrying capacity of the privately owned or controlled lands in the unit we reach an argument that is essentially intertwined with many of the positions examined supra: that the proper carrying capacity has been determined by

6/ This figure was derived by applying the ratio of 3 AUM's per ton of hay used as supplemental feed allowance. See discussion supra.

past historical use and that the range survey results, conflicting to such a great extent with this actual use, must be seen as erroneous.

Shortly stated, appellants contend that in actual practice they have grazed in the Northeast Unit numbers of cattle and/or sheep based on the earlier determinations of the carrying capacity of their private lands, and the lands have shown no detrimental effects and therefore, it must be presumed, contrary to the 1964 survey results, that private lands have the carrying capacity traditionally ascribed to them. Alternatively, appellant Midland-Dunton argues that if it is determined that the carrying capacity of their private lands is correctly reflected in the 1964 range survey, a mutual mistake of fact exists and they should be granted additional grazing on the federal range since, perforce of logic, they must have traditionally been utilizing more of the federal range than which they were credited with.

Relating to the first point we note that appellants are attempting to obscure actual use as opposed to authorized use. It is true that overall, throughout the unit, more use was authorized through 1970 than is contemplated under the allotment system. The authorized class 1 demand was 90,278 AUM's. But, if one considers the authorized nonuse for the federal range from 1966 to 1970, one finds that the percent of nonuse to the total authorized use varied from 29.11% to 33.81% or from 26,278 AUM's to 30,524 AUM's. 7/ The average percent of nonuse from 1960 to 1970 was 20.6 percent. Appellant Midland-Dunton had an authorized class 1 demand of 4,522 AUM's but from 1966 through 1970 there was an authorized nonuse of 672, 1,544, 921, 1,052, and 1,052 AUM's, respectively. Appellant Erramouspe Brothers with a class 1 demand of 5,402 AUM's carried nonuse in the same period of 1,052, 1,052, 197, 197, and 143 AUM's, respectively. Appellant G. & E. Livestock, Inc., with a class 1 demand of 2,933,

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7/ These figures are derived from exhibits G-24 and G-25 which the Judge rejected pursuant to objections relating to their materiality. (Tr. 621-625). They were included in the record as an offer of proof. The government attorney argued that while they merely showed nonuse taken on federal land, they were material to the issue of actual use on the privately owned land, because since the lands were intermingled a decrease in the use of the federal range would almost certainly have a concomitant effect on adjacent, unfenced private lands, grazed as they were in common. We agree and find that it was error for the Judge to have excluded these exhibits, since they are probative as to the issue of overgrazing on the private lands.

had authorized nonuse of 414 AUM's in 1966 and 490 AUM's in 1967. Furthermore Midland-Dunton's own exhibit, MD-6, shows that considering both nonuse of the federal range and of its private lands under the percentage-use licensing system then employed, there was a total nonuse of 1,080 AUM's in 1966, 1,904 AUM's in 1967, 2,364 AUM's in 1968, and 2,334 AUM's in both 1969 and 1970.

Admittedly the first set of figures indicates the amount of nonuse accredited to the federal range. However, as the boundaries between the federal range and private lands were of a legal rather than a physical nature it strains credibility to believe that the animals grazing would respect the same.

Additionally, even the subtraction of the nonuse from the authorized total use does not necessarily provide an accurate figure of the number of animals actually grazing. As the BLM Manual notes:

> * * * The reliability of licensed numbers for actual use data is questionable at best. Many times the user may not turn out with the numbers and on the dates for which he applied.
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> BLM Manual 4412.22A1

Appellants' witness Thackaberry testified that he felt that the original estimates of the carrying capacity were in error. Indeed, appellant Midland-Dunton in its brief to this Board points out a very plausible explanation for the drastic revision of the carrying capacity of the privately owned and controlled lands: viz, they were utilizing more federal range than they had previously believed.

Pursuing this point, Midland-Dunton embarks upon a theory that a mutual mistake of fact has existed since the inception of licensing in the District, and that therefore they are entitled to additional federal range. We must admit that we find it difficult to follow the logic of Midland-Dunton's argument, assuming that their class 1 demand has been satisfied. Under an exchange-of-use agreement they can only get a quid pro quo; that is, they can acquire a right to graze on the federal range only to the extent of the present carrying capacity of their private lands, see discussion supra.

An even more fundamental flaw in their argument is their bland assumption that the ritual invocation of the words "mutual mistake" requires that the errors of past practice be engrafted into permanence. The doctrine of mutual mistake, however, is only relevant

where an unjust injury would occur if one of the parties to an agreement was not absolved from performance. Appellants show no detrimental reliance in the situation before us. Rather they admit that they utilized more range than they had a right to. The mistake of which they now complain was one whose benefits flowed solely to the appellants. The appellants can hardly be heard to argue that a "mutual mistake" necessitates the continuation of their "unjust enrichment."

Midland-Dunton apparently now contends, as an alternative ground, that its class 1 demand is not met since they had a greater dependency by use than they claimed in 1935. This contention runs afoul of two separate provisions of the regulations. 43 CFR 4115.2-1(e)(9) provides:

> Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:
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> (i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under §§ 4111.4-3(a)(3) and (c), and 9239.3-2(e) of this chapter.

43 CFR 4115.2-1(e)(13) provides:

> (i) No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

Under either of these provisions Midland-Dunton cannot reacquire its alleged proper class 1 demand. The mistake in not applying for its proper demand is not mutual, but strictly the error of Midland-Dunton. No relief is available at this late date.

Having considered all the arguments raised by the appellants relating to the propriety, manner and accuracy of the range survey

as it relates to privately held lands, the decision of the Judge is affirmed as to this issue for the reasons given above.

The second issue on appeal is the carrying capacity of the lands within the allotments devised and whether sufficient forage exists within the confines of the specific allotments to meet the appellants' class 1 demands. On this issue the Judge found that not only had there been no testimony that would indicate an insufficient amount of forage within the allotment, but that the testimony tended to show that there was more than enough. Appellants G. & E. Livestock, Inc., and Erramouspe Brothers, argue that even though they may have received sufficient forage to satisfy their class 1 demands, other parties received more than their aliquot share. Be that as it may, it is well settled that a grazing applicant who has been allotted his full class 1 demand has no standing to contest allotments made to others. See M. P. Depaoli and Sons, A-25978 (March 29, 1951); C. A. George, Vera Bowen, A-27488 (November 7, 1957). Appellant Midland-Dunton in its appeal admits that they "now have adequate range for all their livestock for all seasons of the year * * *." No other arguments on this point have been presented (except for those discussed supra relating to carrying capacity of the private land) and the Judge's determination of this issue is affirmed.

The third issue on appeal involves the areas of the allotted uses. Since each appellant has varying objections to their particular allotments it will be necessary to discuss each individually. As a general matter, however, certain observations of the applicable law could be made that would be germane to all parties.

No allottee has a right to a specific area within a grazing district. Joyce Livestock Company, 2 IBLA 322 (1971); Delbert and George Allan, Eldon L. Smith, 2 IBLA 35 (1971); Melvin Adams, supra. The traditional rule on what quantum of detriment was necessary to invalidate an individual's allotment was established in National Livestock Company and Zack Cox, I.G.D. 55 (1938). In that case it was held that a complaint against the allotment of a particular area "could only be entertained upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land, and improvements of the operator adjacent to the grazing district and seriously endanger the possibility of his continuance in the livestock business." Id. at 60. It was this standard that the Judge employed in examining the allegations made by appellants. Subsequent to his decision, however, this Board reversed the National Livestock rule in United States v. Charles Maher, 5 IBLA 209, 79 I.D. 109 (1972). The rationale of Maher was that it was erroneous to connect the concept of "arbitrary

and capricious" with the economic destruction of a livestock enterprise. Rather, it held that if the allotment allocation was arbitrary and capricious, the degree of economic injury was irrelevant; such a decision could not be sustained. But that decision similarly rejected the position that a determination "even though reasonable, which renders valueless the base lands of an appellant is necessarily in contravention of the Taylor Grazing Act." Id. at 220, 79 I.D. at 115 (emphasis in original). The test to be applied is one of reasonableness. The degree of economic injury is one consideration going to the reasonableness of the District Manager's determination. Should the District Manager's decision have a reasonable basis, it must be affirmed.

Appellant Midland-Dunton was allotted use of two areas, the Reservoir and the Prospect Mountain allotments. Midland-Dunton objects to their proposed allotments arguing that they exclude certain areas in which they have contributed to range improvements and eliminates other lands that they need, and have traditionally utilized, for lambing purposes. Regarding the first point, it is noted that there were only two areas in which their improvements were not included in their proposed allotment, one of which contains some 2,800 acres, north of the Eden Valley Unit, consisting of approximately the W 1/2 of sec. 29, sec. 32, SW 1/4 of sec. 33, T. 27 N., R. 105 W., sec. 4 and 5, E 1/2 of sec. 8, W 1/2 of sec. 9, T. 26 N., R. 105 W. It is unclear whether Midland-Dunton paid for the reservoirs found on this land since Government records indicate that at least some of these were totally funded by the Government. In any eventuality, numerous cases establish the proposition that development of water invests no preemptive rights to use federal range adjacent thereto. See e.g., M. P. Depaoli and Sons, supra; William Sellas, I.G.D. 677 (1958).

The other lands excluded on which Midland-Dunton argues that they have developed water were in an area known as the Elk Wash, and total about 500 acres of land, primarily consisting of the S 1/2 of sec. 28, T. 28 N., R. 106 W. Charles E. Dahlen, Area Manager of the Farson Resource area, which encompasses the Northeast Unit, who drew up the allotments testified that in determining the boundary lines he attempted to follow as closely as was possible the lines established through custom (referred to in the record as gentlemen's agreements). Further he testified that in disputed areas he attempted to get agreement between the affected parties. (Tr. 636). Thus, as regards the Elk Wash area he noted that there was a conflict between the two adjacent allottees as to what the traditional boundary had been and Dahlen decided, therefore, to divide proportionately the land in the disputed area.

(Tr. 635-636). It was, he testified, impossible to give everyone his class 1 demand and give everyone his former use, particularly since the actual former use was a matter of some dispute on the part of the range users. Certainly there is no compelling evidence that the allotment lines so far discussed were drawn in an arbitrary or capricious manner. Indeed, with the exception of their loss of lambing grounds, discussed infra, Midland-Dunton admits that they "have adequate range for all of their livestock for all seasons of the year * * *."

Midland-Dunton's strongest objection relates to what they contend is a deprivation of vitally needed lambing grounds, outside of the exterior boundaries of the Prospect Mountain allotment consisting of the SE 1/4, E 1/2 SW 1/4, SW 1/4 SW 1/4 of sec. 35, SE 1/4 SE 1/4 of sec. 34, T. 30 N., R. 104 W., W 1/2 W 1/2, E 1/2 W 1/2 of sec. 1, sec. 2, E 1/2 E 1/2, SW 1/4 SE 1/4 of sec. 3, N 1/2 NE 1/4, part of S 1/2 NE 1/2 of sec. 9, N 1/2 N 1/2, part of S 1/2 N 1/2 of sec. 10, N 1/2 N 1/2, part of S 1/2 NW 1/4 of sec. 11, T. 29 N., R. 104 W. This land, appellants claim, is essential to their lambing operation, and further, they note, that since they have the rights to the developed water in the area, the land in the adjacent allotment will be useless to its prospective allottees. Taking this second point first, Dahlen noted that it might well be possible to develop additional water in the new allotment. More fundamental, however, is the fact that the very land which appellants claim is essential to their lambing operation, was the subject of a trade with one Leonard Hay, extending for five years, at some unascertained period in the past. We are constrained to hold that appellant Midland-Dunton has not carried its burden of showing that the assigned areas of use were allotted in a manner that could be characterized as either arbitrary or capricious.

Appellant G. & E. Livestock, while admitting that all of its improvements are within the exterior boundaries of its allotment, contends that better range management practices would necessitate the moving of the east boundary of the Poston allotment approximately two miles further east in various areas. G. & E. Livestock contends that this would allow better utilization of the service areas of its waters within the Poston allotment. As we have indicated above, however, the drawing of the allotment boundaries is one committed to the discretion of the District Manager, see E. L. Cord, 9 IBLA 178 (1973); it is incumbent upon one challenging the allotment to show that the designated areas of use were constructed in an arbitrary and capricious manner and are devoid of a reasonable basis. United States v. Charles Maher, supra. It is insufficient merely to show that the limits of an allotment could be placed

in another place and still be in consonance with sound range management practices. Rather, the evidence adduced must show that the proposed allotment lines have no reasonable basis in fact and that the decision delineating them is arbitrary or capricious. This appellant G. & E. Livestock has not done.

Appellant Erramouspe Brothers raise objections to their proposed allotment of the Continental Peak area on two separate grounds. First, they argue that the decision excludes from their allotment two parcels of land which they lease and for which they expended approximately $11,000 to acquire. Secondly, they protest that the Continental Peak allotment as devised, removes nearly all of the lower elevational range which they normally grazed and have substituted higher elevational range for them. The effect of this, they contend, will be to greatly impair their operations since the lower ranges are essential to grazing in both the early Spring and the late Fall.

Considering their first contention, this Department has in the past validated allotments that excluded allottee's privately owned or controlled lands. Thus, in Nestor Storey, I.G.D. 650 (1957), the Department affirmed an allotment which excluded a section of land on which the appellant owned a state lease. The detriment herein complained of is more imagined than real. The District Manager has indicated a willingness to accept an exchange-of-use agreement for the carrying capacity of those lands. And if appellant prefers not to enter such an agreement he has the right to graze these lands, provided he fences them. Access thereto may be obtained by making a request for a crossing permit pursuant to 43 CFR 4115.2-1(k)(1)(vi) which provides:

> Upon application filed with the District Manager, by any person showing the necessity for crossing the Federal range with livestock for proper and lawful purposes, a crossing permit may be issued. Charges are payable in advance at the same rate charged for regular grazing use, except that no fee will be charged where the trail to be used is so limited and defined that no substantial amount of forage will be consumed in transit.

There is no indication in the record that the District Manager would refuse to grant such a crossing permit.

As regards their second objection, John Erramouspe suggested that he would be willing to trade a portion of his Continental Peak allotment containing 3,128.2 allowable AUM's for a portion of the Red Desert allotment, which he prefers because of its elevation,

containing 682 AUM's, with a net loss of 2,446.2 AUM's. The Continental Peak allotment is shared among Erramouspe Brothers, Magagna Brothers and Vernon Mrak, with a crossing allowance for Bar X Sheep Company and Leonard Hay. The total authorized use of the allotment (including possible exchange of use) is 7,714 AUM's of which 4,138 AUM's are allocated to Erramouspe Brothers. What is unclear from the record is to what extent Erramouspe Brothers is willing to absorb the 2,446.2 loss of AUM's. It may well be that Magagna Brothers and Vernon Mrak do not share appellant's enthusiasm for the lower elevations. Dahlen testified that should all parties be agreeable to the proposed revision he would be happy to effectuate it. (Tr. 662). Appellants have not shown that the District Manager's original decision was erroneous, and it will be affirmed. If, however, all parties in both the Continental Peak and Red Desert allotments agree to an arrangement to effectuate the exchange discussed above, it is directed that the allotments be varied accordingly.

Appellant Midland-Dunton has an additional protest against a change in their trailing use. Prior to the decision appealed from, Midland-Dunton trailed 8,000 sheep through the Little Colorado Unit. Midland-Dunton also trailed approximately 2,000 sheep on a different route entering the Northeast Unit at roughly T. 25 N., R. 106 W., and continuing due north until they reached the Prospect Mountain allotment. Such a route would pass through the Pacific Creek and Little Sandy allotments. The District Manager's decision terminated the appellants' right to this latter trailing use and provided that all of the sheep should trail on the Little Colorado Unit. Appellants object that this trail is four miles longer than the former trail, and that the addition of 2,000 sheep would increase congestion on the trail and thereby raise the likelihood that bands of sheep owned by other operators who use the trail will become intermixed requiring the expenditure of great amounts of time to separate them.

The Judge, in his decision, noted that since 8,000 of appellants' sheep already successfully negotiate the trail, the extra four miles of distance required to be traveled could not create too difficult a problem. Similarly he felt that a 25 percent increase in the amount of sheep trailed through the Little Colorado Unit by the appellants would not markedly appreciate the incidence of mixing. We agree. In Kermit Purcell, A-29661 (November 15, 1963) the Department held that as related to the appellant therein "[a]lthough the long trailing is inconvenient to him, it does not appear that it is impossible as a practical matter." The inconvenience alleged here does not even approach a showing of impossibility.

Finally, appellant Midland-Dunton protests that its class 1 demand is understated by 80 AUM's. 8/ It is admitted that prior to 1963 appellant was awarded this use. In 1963, however, through a chain of complicated error, this use was inadvertently omitted. Appellants were unaware of this loss until recently. The Judge held that regardless of the nature of the mistake in 1963, no increase in class 1 demand could be obtained, since they were not included in an application for a license for two consecutive years, see 43 CFR 4115.2-1(e)(9), and further that 43 CFR 4115.2-1(e)(13) expressly forbids readjudication of any license regarding base property qualifications where such qualifications have been recognized for a period of three consecutive years or more. Appellants attempt to meet this contention by arguing, in effect, that they relied upon BLM personnel to complete their applications, it was through their error that the 80 AUM's were not included subsequent to 1963, and the Bureau should therefore be estopped from applying both of the above cited code provisions.

An extended discussion of this point is unwarranted, however, since we believe that the 80 AUM's are unavailable to the appellants for a different reason. In a Notice of Advisory Board Recommendations, dated February 6, 1969, appellants were advised that their class 1 demand was established at 4,522 AUM's. They were further notified in this letter, that if no protest was made by February 26, 1969, the recommended decision would:

> * * * constitute the District Manager's decision on your base property qualifications. Should this notice become the District Manager's decision and if you wish to appeal such decision for the purpose of a hearing before an Examiner, in accordance with 43 CFR 1853, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the District Manager, Bureau of Land Management.

Appellants neither protested nor appealed this Notice. This Notice was a final decision within the ambit of 43 CFR 4.470(b) which provides:

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8/ While this issue was discussed in Wyoming 4-70-23, etc., it was also the subject of a separate action in Wyoming 4-71-6. By decision dated March 30, 1972, Administrative Law Judge Dent D. Dalby granted the Government's motion to dismiss the separate appeal basing it on his decision in Wyoming 4-70-23, etc. Both cases have been consolidated for treatment in this opinion.

> Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision.

See Beryl Shurtz, 4 IBLA 66 (1971). The fact that no subsequent action was taken by the District Manager does not vitiate the result that the decision thus finalized was res judicata and not amenable to review in a subsequent action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Newton Frishberg, Chairman

Frederick Fishman, Member.